

[*Brown v. Holmes & Narver, Inc.*](#), 90-ERA-26 (ALJ Dec. 19, 1990)

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U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

Case No: 90-ERA-26

Date Issued: December 19, 1990

IN THE MATTER OF

DONALD W. BROWN
Complainant

v.

HOLMES & NARVER, INC.
Respondent

NAHUM LITT
Chief Judge

RECOMMENDED ORDER TO DISMISS WITHOUT PREJUDICE

On July 17, 1990, Complainant Donald Brown moved for a voluntary dismissal of his complaint without prejudice. On July 24, 1990, an order to Postpone Proceedings and to Show Cause was issued, which, *inter alia*, required Respondent to submit a list of expenses it wished to have considered as a condition precedent to the granting of such a motion. Another Order to Show Cause was issued on August 21, 1990, after receipt of Respondent's response to the July 24, 1990 order. Complainant's response was received on September 14, 1990.¹

Discussion

Complainant filed this appeal on March 5, 1990. A hearing, set by agreement of the parties for July 24, 1990, was postponed and rescheduled for August 21, 1990 (Order to Postpone Proceedings and to Show Cause, dated July 24, 1990). This rescheduled hearing date was cancelled due to the pending motion to dismiss.

Throughout the proceedings, the jurisdiction of the

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Department of Labor has been at issue. Motions concerning the jurisdiction of the Department have been filed by both parties, although neither agreed with the other's motion at the time it was at issue.² These motions, several argumentative teleconference calls, and various alleged abuses of the discovery process typify the manner in which this case has been handled by both parties. Respondent's characterization of this action as "frivolous" (see page 3 of Respondent's response to the July 24, 1990 order to Show Cause) and Complainant's various attempts to refuse to be deposed typify the attitudes taken by the parties in these proceedings. In sum, neither side can be said to be more to blame than the other for the hostility between the parties.³

Complainant notes first that payment of attorney's fees, or other costs, is not required as a condition upon which dismissal without prejudice may be granted. While it appears that attorney's fees, in some amount, are generally required before a petitioner may obtain the benefit of a dismissal without prejudice, Complainant is correct that in certain circumstances costs or fees need not be required. For the reasons set forth below, Complainant is not required to pay attorney's fees as a condition precedent to a dismissal without prejudice.⁴ Complainant should, however, pay minimal copying costs which relate to actions taken by Respondent which are only useful in this litigation.

While a claimant's payment of certain attorney's fees is often a condition to permit voluntary dismissal without prejudice, such a condition is not required, and other conditions may be attached to such a dismissal instead. *See, Davis v. USX Corp.*, 819 F.2d 1270, 1276 (4th Cir. 1987); *Cants v. Ford Motor Co.*, 781 F.2d 855 (11th Cir. 1985); 5 Moore's Federal Practice, § 41.06, p. 41-79 (1984); 9 Wright & Miller, Federal Practice & Procedure, § 2366, p. 181 (1978). In whistleblower cases, the conditional payment of attorney's fees is a requirement which "should be exercised only to protect a respondent's legitimate interest in the avoidance of legal harm or prejudice." *Nolder v. Raymond Kaiser Engineers, Inc.*, Case No. 84-ERA-5 (Decision and Order of the Secretary of Labor, dated June 28, 1985); *Stokes v. Pacific Gas & Electric Co./Bechtel Power Corp.*, 84-ERA-6 (Decision and Order of the Secretary of Labor, dated July 26,

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1988). Alleged whistleblowers should not be discouraged from reporting health and safety hazards or from filing discrimination complaints, and it follows that complainants not be discouraged from pursuing their issues before the Department merely because it may appear at some later date that an action before a state court is an alternative. *See, generally, Polizzi v. Gibbs & Hill, Inc.*, 87-ERA-38, ps. 2-3 (Decision and Order of the Secretary of Labor, dated July 18, 1989); *English v. General Electric Co.*, 110 S.Ct. 2270, 2277 (1990) (Energy Reorganization Act amendment, protecting whistleblowers, "encourages employees to report safety violations and provides a mechanism for protecting them against retaliation for doing so."). While this public policy concern is not

dispositive of whether attorney's fees should be attached to a given dismissal order, this valid concern does affect the manner in which the parties' arguments have been considered.

In general, only those attorney's fees which relate to items which would not be useful in an anticipated litigation may be chargeable as a condition to dismissal without prejudice. *Davis v. USX Corp.*, *supra*; *McLaughlin v. Chesire*, 676 F.2d 855 (D.C. Cir. 1982); *Canley v. Wilson*, 754 F.2d 769 (7th Cir. 1985). Therefore, almost all of the actions and costs made by Respondent's attorneys, listed in Employer's response received July 31, are not properly items which may be attached to an order dismissing this complaint. The majority of the work performed relates to discovery requests and responses. Other work relating to the jurisdiction of this forum, and other forums, will prove useful to Respondent's future defenses and analysis of the applicable law. As noted above, the use of jurisdictional arguments by both sides has appeared tactical as well as substantive. None of this work can be said to be useless for any further litigation; work relating to discovery is extremely beneficial to Respondent should Complainant choose to file a state action in the future since Respondent will have many of the vital facts and documents prepared in a manner conducive to responding to anticipated discovery requests. Only eighteen items of work,⁵ performed on sixteen various days, are not related in some manner to discovery or jurisdiction. The work performed on these additional days represents discussions between various attorneys and Respondent concerning schedules, strategies, and approval of proposals. The merit of such work is not limited to this action before the Department of Labor, but

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has prepared Respondent and its attorneys for the types of trial strategies best suited for defending a possible state claim and has developed an understanding between Respondent and its attorneys as to the appropriate characterization of facts, issues and defenses which Respondent desires in any future litigation. Such experience will reduce the amount of time needed to prepare defenses and documents before the court, and is thus of value to Respondent in such future proceedings.

However, some costs incurred by Respondent relating to copying expenses have no relative value in future litigation. A reasonable cost of \$.10 per page is allowed for 2,931 pages which were copied by Respondent's attorneys. Only five copies of each document were necessary for these proceedings (Respondent's various file copies and client copies, while possibly typical of Respondent's filing system, and multiple copies to the Department of Labor, are not properly chargeable to Complainant as a condition). Referring to Respondent's list of copying costs, the following items are properly chargeable to Complainant: item 1 (5 copies of 46); item 2 (5 copies of 6); item 3 (5 copies of 36); item 4 (5 copies of 7); item 11 (5 copies of 4); item 12 (5 copies of 50); item 12(2) (5 copies of 21); item 13 (5 copies of 10); item 14 (5 copies of 4); item 15 (5 copies of 14); item 24 (2 copies of 367); item 25 (2 copies of 288); item 26 (2 copies of 214); and item 27 (2 copies of 104). These 2,931 copies represent a cost to Respondent of

\$293.10. After crediting Complainant with \$50.75 already paid for copies, \$242.35 is properly chargeable to Complainant as a condition of the dismissal without prejudice.⁶

Further, Complainant did not argue against the imposition of other terms suggested in the August 21, 1990 Order to Show Cause. Of those suggested terms, two are adopted as additional conditions precedent to granting Complainant's motion for voluntary dismissal without prejudice. Since conditions other than payment of costs are appropriate in certain circumstances, and since Complainant is not required to reimburse costs except for minimal copying fees, it will protect the defendant's legitimate interests to have certain items available for use in future litigation. Therefore, Complainant shall provide answers to all interrogatories previously propounded by Respondent during these proceedings, and Complainant shall agree that all evidence gathered by Respondent during these proceedings may be used in any further proceeding filed against Respondent.

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Recommended Order

1. It is ordered that Donald W. Brown's appeal filed March 5, 1990, under the Energy Reorganization Act, specifically under 42 U.S.C. § 5851 and the implementing regulations found at 29 C.F.R. Part 24, is dismissed without prejudice.

2. Within seven days after this Order becomes final, Complainant Donald W. Brown shall pay to Respondent, Holmes & Narver, Inc., \$120.00 reimbursement for copying costs incurred by Respondent. Within twenty-eight days after this order becomes final, Complainant shall pay the remaining copying costs of \$122.35 to Respondent, Holmes & Narver, Inc. Such reimbursement shall be considered a condition to the dismissal without prejudice.

3. Within fourteen days after this Order becomes final, Complainant Donald W. Brown shall answer all interrogatories propounded by Respondent during these proceedings.

4. Complainant Donald W. Brown, by accepting this dismissal without prejudice, agrees that all evidence gathered by Respondent during these proceedings may be used in any further proceeding filed against Respondent by Complainant.

NAHUM LITT
Chief Administrative Law Judge

NL/DS

[ENDNOTES]

¹An extension of time was granted for Complainant's response.

²Complainant again moves for certification of the jurisdictional issue to the Secretary, to avoid the imposition of any possible conditions to his motion for dismissal. For resolution of this issue, the parties are referred to my two previous orders denying dismissal on jurisdictional grounds in response to Respondent's motions.

³One of the factors to consider is the hostility which this litigation has provoked. Mutual allegations of abuse of the discovery process are not to be overlooked in determining the appropriate conditions, if any, to attach to an order of dismissal without prejudice. *Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 51 (1st Cir., 1981). Had the parties approached this proceeding with a more cooperative and less spiteful attitude, many of the items produced by both sides would have been unnecessary and irrelevant.

⁴Complainant argued in his brief that Mr. Brown's inability to pay any attorney's fees, and Employer's alleged relative wealth, should be considered as a factor in determining whether to require him to pay Employer's attorney's fees. Such a factor is not an appropriate consideration in determining whether to attach conditions to an order dismissing a complaint without prejudice. *See, Taragan v. Eli Lilly*, 838 F.2d 1337 (D.C. Cir. 1986).

⁵By reference to their dates, these items include: 1/31/90; 3/27/90; 4/02/90; 4/27/90; 5/15/90; 6/17/90; 6/22/90; 7/02/90; 7/06/90 (item 2); 7/09/90 (item 2); 7/10/90 (item 1); 7/13/90 (items 2 and 4); 7/18/90 (items 2 and 3); 7/19/90 (items 2 and 3); and 7/20/90.

⁶Costs relating to Respondent's choice of using Federal Express, over other mailing methods, are not properly chargeable to Complainant.